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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

HARRY R. BOOTH,

Petitioner,

vs.

LEMONT MFG. CORP., CECO STEEL PRODUCTS CORP., PUBLICKER CHEMICAL CORPORATION, AMERICAN OIL CO., UNION TANK CAR CO., CORN PRODUCTS CO., METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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A major reason for granting this Petition is that the opinion of the Court of Appeals is predicated upon the assumption that there have been no developments in the fields of due process, equal protection of the laws, public actions and federal jurisdiction as a result of decisions of this Court during the past 60 years, other than *Angel* v. *Bullington,* 330 U.S. 183 (1947) and *Skelly Oil* v. *Phillips Pet. Co.,* 339 U.S. 667 (1950). Neither it or the District Court displayed proper consideration or regard for the decisions of this Court; and the separate issues decided by them are, as argued below, in conflict with this Court's decisions and principles. The errors were compounded when it sanctioned a District Court judgment based on conclusions illustrated by a finding it would not hold an Illinois law in violation of equal protection rights as it assumed contrary to plain legal history this would force state courts to entertain remote taxpayer suits. The District's 1,000,000 taxpayers have been unjustly denied the benefits of constitutional principles applied by this Court in the past 35 years. All this and more demand the exercise of this Court's supervision and the granting of this Petition	11

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Now Comes Harry R. Booth, Petitioner, pro se, and respectfully prays that a Writ of Certiorari issue to review the final judgments of the Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW

The decision of the Court of Appeals is reported in 440 F. 2d 385, and the District Court in 304 F. Supp. 235.

The opinions are included in the separate Appendix[1] to this Petition as is the opinion of Judge Hubert L. Will in the companion case of *Booth* v. *General Dynamics Corp. et al.*, 264 F. Supp. 465, his two unreported opinions and the ruling of the Court of Appeals in the *In Re General Dynamics* Original February 7, 1968 (App. 23). The Appendix also includes directly related state court rulings and documents. An index to them is found in this Petition and Appendix.

JURISDICTION

The jurisdiction of this Court is founded upon 28 USC Sec. 1254(1). They are included as Exhibits herein.

STATEMENT OF GROUNDS UPON WHICH THIS COURT'S JURISDICTION IS FOUNDED

1. The Court departed from accepted and usual course of judicial proceedings requiring the exercise of this Court's supervisory powers since Judge Kerner was required by considerations of due process to withdraw from this case.

2. The conflict between this Court's decisions and the judgment below that state denial of procedural due process and equal protection are not personal rights conferring jurisdiction under 28 U.S.C. (1343)(3) require reversal, or in the alternative this Court should settle conflicts on this vital issue between that Court and other Courts of Appeal.

3. It failed to reverse and remand for trial in view of the intervening change in Illinois law.

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[1] Reference to this Appendix are (App.), to Court of Appeals Appendix (C.A. App.), and to Supp. to C.A. Appendix (Supp. C.A.). Abstract in Booth v. San. Dist. et al., 79 Ill. App. 2d 310; 224 NE 2d 591. Both are filed here as part of Court of Appeals Record.

4. The judgment below decided important other federal questions in conflict with applicable decisions of this Court, for:

a. Having assumed the Illinois special injury rule violated the equal protection clause, the Court was under a duty to decide this issue.

b. It erroneously held plaintiff was estopped from asserting constitutional rights and disregarded principles of abstention and equitable factors.

c. It gave effect to state court judgments though plaintiff had challenged them as a fraud and Judge Will held such issue required a hearing.

5. It failed to find plaintiff's action was predicated upon a traditional joint and common claim.

6. It disregarded earlier rulings in the General Dynamics' Companion Case by the Court of Appeals holding in effect Plaintiff's constitutional claims were so substantial as to require a hearing on the merits, and Judge Will's decision upholding federal jurisdiction.

7. It erred in finding plaintiff could not raise constitutional issues for they constituted an anticipation of the defense contemplated by defendants.

8. It was bound to remand the case to the District Court for trial and for reassignment to Judge Will as a related case to General Dynamics.

STATUTES AND CONSTITUTIONAL PROVISIONS

The Constitutional Provisions and statutes relied upon are: 28 USC 1331, 1343(3); Art. III, Sec. 2 and Amendment XIV, Sec. 1. The statutes are reproduced p. 29.

QUESTIONS PRESENTED

1. Was Judge Kerner under a duty to withdraw from the case?

2. Did the denial by the Illinois courts of plaintiff's right to institute a public action to enforce public rights in land leased to the corporate defendants confer jurisdiction under 28 USC 1331 or 1343(3) based on his equal protection and due process procedural and substantive claims?

3. Does the intervening 1970 change in the Illinois special injury rule require reversal of both judgments below under the principle of partial mootness?

4. Did the Court err in holding Plaintiff was barred by estoppel from presenting his equal protection claim?

5. Did jurisdiction nevertheless vest, since the Appeals Court did not apply estoppel to procedural due process claims?

6. Was the Court required to consider the principles of abstention and equitable estoppel?

7. Was it required to consider Judge Will's ruling a hearing was necessary on plaintiff's challenge that the State Court judgment was a fraud?

8. Was Plaintiff's action predicated upon a traditional joint and common claim permitting aggregation of claims within Rule 23?

9. Did the Court err in holding that Plaintiff could have been barred from presenting his constitutional claims as it thought he was anticipating an unconstitutional defense?

10. Were the Lemont and General Dynamics cases related actions so as to require reassignment of the Lemont Case to Judge Will?

STATEMENT OF THE CASE

This suit, called Lemont, is the second federal action[1] instituted by plaintiff as a result of rulings of the Illinois courts[2] dismissing his prior class public action on the principle that only taxpayers suffering private injury possess standing to enforce equitable interests in public property held in trust. His state complaint as amended, in five counts, challenged the validity of some 25 of the District's long term (50-99 years) leases of land adjoining its navigable waterways, improved by large federal and District expenditures, the retroactive recovery of inadequate rentals, a declaratory judgment, judgments against officers of the District and other relief set forth in his extensive pleadings.[3]

The corporate defendants are large industrial corporations, interstate and national in character, similar in nature to numerous other District lessees. The District as of 1963 had executed leases of about 2400 acres for industrial and other commercial purposes. These defendants

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[1] Lemont was filed on Nov. 20, 1968, but the pleading at issue was an Amended Complaint (C.A. App. 1-43). The first federal suit. *Booth* v. *General Dynamics Corp.* (Called G. D. suit) was filed April 14, 1966. Judge Hubert L. Will upheld jurisdiction Jan. 24, 1967—264 F. Supp. 465 (App. 10-17). Court of Appeals on Feb. 7, 1968 denied G. D. Writ of Mandamus. (App. 23).

[2] *Booth* v. *Met. San. Dist. et al.*, filed October 24, 1963. Opinion of Appellate Court, 79 Ill. App. 2d 310; 224 NE 2nd 591 (App. 24-29). Controlled in part by *Droste* v. *Kerner*, 34 Ill. 2d 495, 217 NE 2d 73, 79 (App. 33-35) 385 US 456 (1967).

[3] A brief summary of the pleadings is difficult. The state court complaint and exhibits exceeded 100 pages (See Supp. abstract of record to Appellate Court record included in Court of Appeals record filed here). (1-77, 86-102 Exhibits 41). The Lemont Complaint was 43 pages.

possessed eight leases of which five were for terms of 99 years expiring about the period 2040 to 2050 and three were for shorter terms (App. 63-64).[1] One defendant, Lemont, built a steel plant at a cost of $14 million on the 88 acres it acquired from the District under questionable circumstances. It has been paying annual rent of $2,682; under the terms of its so-called leases it would be no more than $4700 per year until after year 2000. (See App. 63, 64) (See C.A. App. 12-15, 57). Another lessee, Corn Products, was permitted for 99 years to use millions of gallons of water daily though its annual rental for 14.2 acres for more than 50 years did not exceed $2100 per year (C.A. App. 17, 18).

Considering the valuable public land at stake and the wrongful acts by defendant corporate lessees in acquiring it, these suits are generally comparable in major respects to the Teapot Dome litigants.[2] (*Mammoth Oil Co.* v. *U. S.*, 275 U.S. 13 (1927); *Pan American Oil Co.* v. *U.S.*, 273 U.S. 456 (1927).

The pleadings in the federal actions were generally related first to federal jurisdiction and second, specific allegations to the operations of the District, its overall aspects of its long term lease transactions, specific details bearing upon leases of corporate defendants, equitable in-

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[1] HKH Corp. was also a defendant in the courts below. Though the Court of Appeals denied its prayer for damages and other costs in an amount in excess of $20,000 against plaintiff, the risks incidental thereto required him to drop HKH as a respondent.

[2] See Appendix (63-64 and 65-68) Excerpts Ill. Leg. Reports and New Republic, July 3, 1965, p. 915. Chicago—The Low Rent District. Demaris—Captive City—Lyle Stuart Inc. (1969). (See fn. 1, p. 12.)

terests of plaintiffs, related conclusions claiming fraud and prayers for relief. The Lemont Complaint in Count II (C.A. App. 36-42), included a motion for a declaratory judgment based upon allegations that the defendant leases and numerous others were void on their face in that they were executed without competitive bidding, lacked provisions during their 99 year terms or otherwise for periodic redetermination of rentals and other clauses indispensable to a proper public trustee-private corporation relationship.

His jurisdictional allegations claiming the special injury rule violated the due process and equal protection clauses were specific and in detail (C.A. App. 5,6). He also alleged that it discriminated against the poor who owned no real estate and in favor of wealthy citizens, or large private corporations, who, if any, could claim special injury. (C.A. App. 43)

On June 18, 1964 the state court sustained defendant's motions to dismiss plaintiff's action finding "plaintiff does not have legal capacity to bring this action and that the complaint is multifarious". (App. 30-32). The Judge had earlier denied plaintiff's motion he withdraw on the ground his son was a partner in the law firm representing American Oil Company, a major defendant.

This judgment was affirmed by the Appellate Court[1] primarily on the standing issue. It also upheld the Chancellors refusal to withdraw and denied plaintiff's motion to amend his pleading to demonstrate the existence of fraud by intervening facts. While pending on appeal, the Illinois Supreme Court, after two rehearings, confirmed its

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[1] 79 Ill. App. 2nd 310, 224 N.E. 2nd 591 (App. 33-35). Controlled in part by *Droste* v. *Kerner*, 34 Ill. 2nd 495, 217 N.E. 2nd 73, 79 (1966) (App. 33-35) 385 U.S. 456 (1967).

earlier decisions upholding the same special injury rule. *Droste* v. *Kerner*, 217 N.E. 2nd 73, 79 (March 24, 1966). (App. 33-35)

Faced with the hopelessness of relief in the state courts plaintiff filed his first federal action in April, 1966, against General Dynamics Corp. called G.D.

Judge Will upheld federal jurisdiction declaring the District taxpayers though denied a remedy in the Illinois courts possess equitable property interests supporting federal jurisdiction under 28 U.S. 1331 and Article III (264 F. Supp. at pp. 463, 473), qualified his rejection of plaintiff's argument the special inquiry rule violated his equal protection rights. (pp. 468, 469, App. 13, 14)

Later G. D. sought a Writ of Mandamus in the Court of Appeals to compel Judge Will to expunge his jurisdictional ruling or in the alternative to certify the jurisdictional and Rule 23 issues for immediate review under 1292 (b). The Court on Feb. 7, 1968, denied G. D.'s Petition though it held the questions raised by G. D. were substantial but could be presented upon final appeal. (App. 23)

On April 13, 1969 the G. D. case was settled following extensive negotiations, a public hearing, approval by the District, plaintiff, General Dynamics and District Judge Will.[1] Plaintiff believed the jurisdictional issue had been determined in this District Court. An urgent need required the institution of an action against a number of District lessees holding 99 year leases which could not be pressed if plaintiff was compelled to undergo the expensive and time consuming G. D. trial.

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[1] He had not pleaded this rule was in conflict with the equal protection clause.

By his Lemont amended complaint he hoped to solve its complex problems involving numerous long term lease transactions through his request for a declaratory judgment. Its basis was that defendants and other leases were void on their face and contrary to public policy in that they were executed without competitive bidding, provisions for periodic redetermination of rentals, and other indispensable public safeguards.

The corporate defendants each filed motions to dismiss generally upheld by the Courts below (C.A. App. 53-68). These included (1) Absence of substantial federal question. (2) Controversy does not exceed $10,000 and aggregation of claims improper. (3) State judgment res judicata. (4) Laches and other defenses. The District filed a detailed answer generally admitting plaintiff's specific allegations except those alleging fraud and also joining in the relief prayed for by the defendant. (C.A. App. 70-92). Judge Robson sustained the motions of the several defendants to dismiss. 304 F. Supp. 265 (App. 7-9). He upheld the special injury rule and stated that if it were declared "unconstitutional state courts would be forced to entertain the most remote taxpayer's complaints without limitation."[1] (at p. 267)

After the main briefs had been filed, the Illinois Supreme Court repudiated both the special injury rule and its prior decision in *Droste* v. *Kerner* upholding it.[2] The parties then presented conflicting views as to its impact on the case. The defendants claimed it sustained their right

[1] See (App. 69-72) for summary of decisions in 15 states disagreeing with Judge Robson and upholding standing taxpayers to sue to set aside alleged fraudulent or otherwise sales or leases of public property. Defendants did not produce contrary such decisions.

[2] *Paepeke* v. *P. B. C. et al.*, 46 Ill. 2nd 341, 263 N.E. 2nd 11, 18 (Sept. 1970) (App. 36).

to all the relief demanded in their main brief including a holding the state judgment was res judicata against all District taxpayer suits. (Dfs. Rejoinder.)

On November 9, 1970 plaintiff filed an emergency motion to reverse the judgment below and to remand with directions. He contended the controversy between his class and defendants was a continuing one. (C.A. Record) He also requested a hearing en banc and other relief. The motion was overruled with reservation to reconsider such questions. Following the Court's judgment on January 28, 1971 Petitioner filed a petition for rehearing and hearing en banc (App. 50-62), which was denied on March 29, 1971 (App. 6). On June 20, 1971 Justice Marshall extended the time of filing his Petition until August 12, 1971.

A request for a further extension of time has been filed with the Court.

REASONS FOR GRANTING WRIT

I.

DUE PROCESS AND THIS COURT'S SUPERVISORY POWERS REQUIRES REVIEW OF JUDGE KERNER'S DUTY TO DISQUALIFY HIMSELF.

Between 1963 and 1967 while Plaintiff's suits were pending in the Illinois and Federal Courts, Judge Kerner, as Governor and defendant not only was a direct participant in state and federal issues in the *Droste* case (217 N.E.2d 73, 79 (1966), 385 U.S. 486 (1967), but also argued in this Court in support of principles corporate defendants here contended[1] were decisive to Plaintiff's case before the Court of Appeals which he approved in his opinion.

Judge Kerner's[2] failure to disqualify himself appears to demonstrate an insensitiveness to the constitutional principle that due process demands not merely "absence of actual bias" but that "our system of laws has always endeavored to prevent even the probability of unfairness." (*In re Murchison*, 349 U.S. 133, 136). "Circumstances and relationships must be considered for the disqualifying interest cannot be defined with precision," but "Justice must satisfy the appearance of justice." (p. 136). As Petitioner's charges are of a serious nature, more than a routine reference to the relevant "circumstances and relationships" are necessary.

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[1] Brief of Composite Defendants (C.A. p. 24, 25). Motion to dismiss (App. 37-49).

[2] Petitioner regrets any criticism of Judge Otto Kerner which may be implied from this petition particularly in view of his prior association with the earlier Circuit Judge Otto Kerner when Attorney General of Illinois (See *Nat. Pipeline Co.* v. *Slattery*, 302 US 300; *People's Gas Lt. and Coke Co.* v. *Slattery*, 373 Ill. 31; 25 NE 2d 482; 287 Ill. App. 379; 5 NE2d 285; see also *Peoples Gas Co.* v. *Hart*, 309 US 634.

In his opinion (p. 386 and fn 2), Judge Kerner relied upon *Droste* v. *Kerner* for "the judicially created Illinois special injury rule" as barring plaintiff from prosecuting his taxpayer's action in the Illinois courts against the lessees of the District Droste then appealed to this Court. In the Motion to Dismiss filed by the Illinois Attorney General upon behalf of Governor Kerner and another state officer, it was said they moved to dismiss this appeal on the grounds that it does not "present a substantial federal question, and that appellant lacks the requisite standing to support this appeal." (p. 1) (App. 37).

The Index said, "I. B. Appellant's contentions of a denial of due process of law and equal protection of the law raise no substantial federal question." (App. 38). Lessee-defendants in their composite brief, argued: "The validity of the Illinois special injury rule has been sustained by this Court," and that it likewise decided no substantial federal question was present in both cases. (C.A. Br., pp. 24, 25).

Judge Kerner's participation as Governor and as a defendant in *Droste* was not nominal in nature. He approved the statute transferring the disputed land to U.S. Steel, was surely aware of the extensive controversy[1] over the

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[1] Discussion of the District affairs as a whole brought the Chicago Tribune a Pulitzer Prize in 1962 (See p. 3, May 8, 1962). A special Citizens Committee selected a new District General Superintendent, a Grand Jury inquiry indicted two District officials in connection with certain leases, a special legislative committee conducted a number of hearings in March and April, 1963 (Senate Resolution 22, 73rd General Assembly C.A. App. 132, 75th General Assembly Report of Joint Legislative Committee to Investigate Operations of the Metropolitan Sanitary District of Greater Chicago General Findings, p. 3, 5 (See App. pp. 65-67).

District operations and leases. The widespread demands for reform of the overall District operations occurred during his term as Governor (1963-1968). He must have known of the State Legislative investigations into the affairs of the District between 1963 and 1967. The proposals for drastic reorganization of the District's operations included new standards and restrictions governing the execution of future long term leases. He surely knew these statutes could not be made retroactive.

Government officers or agencies defendants in public action litigation do not necessarily give 100% support to corporate defendants seeking to defeat the public interest. In this very series of suits the Sanitary District originally did in the state action support the position of corporate defendants. Here, however, it filed an Answer admitting nearly all plaintiffs allegations (except direct charges of fraud) and supported plaintiff's prayer for relief.[1] Petitioner objects not to the defense of the state's grant to U. S. Steel, but to the acts of the Governor in joining to oppose the standing of its citizens to sue and to assert the absence of federal questions in this Court.

The responsibility for withdrawal from this case rested squarely upon Judge Kerner himself. The acceptance of this principle by other members of the Court is revealed by the action of Judge Wilbur F. Pell, Jr. when on the morning of the oral argument he excused himself. Unlike cases before the District Court, litigants are not aware of the composition of the Court of Appeals panel hearing an appeal until the day set for argument. Under 28 USC

[1] *Hoffman* v. *Northwestern University et al.*, 69 CH 2714, Circuit Court of Cook County, is a suit challenging non-payment of real estate taxes by lessees of educational institutions. The public official defendants have recently filed a counter-claim seeking the relief plaintiff prayed for.

144 failure of litigants to object does not excuse failure of a Judge to take the initiative to withdraw. *Reford* v. *Brunswick*, 228 U.S. 339 (1913); and *Moran* v. *Dillingham*, 174 U.S. 153 (1899). A recent application by Circuit Judge Craven to this statute stressed both the similarity of the issues and the identical nature of the earlier case.[1] The same principle is equally applicable to this case.

In his Petition for Rehearing, Plaintiff said:

> "The Opinion is also without a statement that the position advanced by or on behalf of Judge Otto Kerner as Governor of the State of Illinois in *Droste* v. *Kerner*, 34 Ill. 2d 495, the important part it played in the claims of the defendants, and the ruling of Judge Robson (regardless of the subsequent Paepcke Opinion) did not conflict with the rights of plaintiff's class of one mission taxpayers to a due process hearing within *In Re Murchison*, 349 U.S. 135, 137 and other related expressions by the federal Courts." (App. 53).

The Court denied this request. However, Judge Kerner recently publicly stated that he avoids hearing cases presenting ethical issues when he was quoted in the Chicago Today newspaper on July 29, 1971, as saying:

> Kerner explained that he avoids court cases which raise ethical questions.
>
> "I make quite certain to disqualify myself in any case where I either had an interest in as governor, such as an executive clemency case, or where I have a stock in a corporation that is before the Court."

It would have been equally appropriate for him to have issued the formal statement suggested by Plaintiff. The desirability of this practice was indicated by the statement of Judge Craven in the *Swann case* (431 F. 2d 135, 137 (1970)).

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[1] *Swann* v. *Charlotte—Mech. Bd. of Ed.*, 431 F.2d 135, 137 (CA 4) (1970).

In *P. U. C.* v. *Pollak*, 343 U.S. 451, 466, 467, Justice Frankfurter said:

> "When there is ground for believing that such unconscious feelings may operate in the ultimate judgment or may not unfairly lead others to believe they are operating, judges excuse themselves. They do not sit in judgment. They do this for a variety of reasons. The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."

This is indeed a case for the exercise of the supervisory power of this Court.

II.

DUE PROCESS AND EQUAL PROTECTION ISSUES WERE DECIDED IN CONFLICT WITH THIS COURT'S CONTROLLING DECISIONS.

A. The Special Injury Rule Offended the Equal Protection Clause.

The Illinois special injury rule required of Illinois taxpayers and citizens to allege and prove special or private injury as a condition to their right to file a public action seeking to safeguard their equitable interest in public property held in trust.

Plaintiff alleged the special injury rule assured judicial remedies only "to a theoretical or substantially nonexistent class" (Par. 8a, C.A. App. 5), created an unreasonable and illogical classification without regard to the nature of the remedy needed to safeguard the rights of the public, discriminated against all or more than 99.9% of the District's taxpayers (Par. 8b and 8c, C. A. App. 5), and arbitrarily discriminated against the poor who owned no real estate and in favor of a limited class of wealthy citizens or corporations operating for profit, (C.A. App. 43).

These allegations required the Courts below to hold the Illinois law to be invidious, that it served no public purpose, arbitrary and void under principles long upheld by this Court. (*Gulf C. & S. R.R. Co.* v. *Ellis*, 165 U.S. 150, 155; *McLaughlin* v. *Florida*, 379 U.S. 184, 190, 191; *Cipriano* v. *Houma*, 23 L. Ed 2d 647, 650; *Phoenix* v. *Kolodziejski*, 399 U.S. 204, 210, 213).

Petitioner pleaded and argued his jurisdictional claims before both Courts entirely upon the denial of equal protection and due process.[1] The facts pleaded by him were not accepted as true contrary to *Bordens Products* v. *Baldwin*, 293 U.S. 194, 209; *Ex Parte Poresky*, 290 U.S. 30, 32.

B. The Special Injury Rule Denied Petitioner's Class Due Process Procedural Rights.

The Court overlooked Plaintiff's basic claim that the Illinois special injury rule denied Illinois taxpayers procedural due process. Illinois taxpayers were denied an opportunity to be heard in the Illinois courts under *Droste* v. *Kerner* and the decisions in Plaintiff's state court action.

In *Barbier* v. *Connolly*, 113 U.S. 28, 31 (1885), this Court declared the right to access to the courts is within the due process and equal protection clauses of the 14th Amendment. Procedural due process is foremost among the vital guarantees of the Bill of Rights. Surely it is equal to the right to vote in local elections.

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*,

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[1] He argued his first "claim of federal jurisdiction is predicated upon separate claims of denial of (1) equal protection, (2) procedural and (3) substantive due process rights under 28 USC 1331, 1343(3), Article III, Sec. 2 and Amendment XIV, Sec. 1 (page 15, see also Main Brief, 16, 17, 18-34, 36, 37, 55).

234 U.S. 385, 394; *Chambers* v. *Baltimore R.R. Co.*, 207 U.S. 142, 148."

This principle was reaffirmed by this Court in *Boddie* v. *Conn.*, 28 L. Ed 2d 113, 117 ff. See also *Goldberg* v. *Kelly*, 397 U.S. 254, 267, 268.

Judge Will correctly held the taxpayers equitable interests in public property were based on their ownership of such property. This is the generally long accepted common law rule among the states. A suit to enforce such rights presents a case or controversy within Article III of the Constitution, 264 F. Supp. 465, 469-472.

Since Petitioner and his class possessed rights in property which they were denied the right to protect by access to the Illinois Courts, this Court should grant this petition and hold that they were denied procedural due process, reverse the judgment of the Court of Appeals with instructions that it set aside the judgment of Judge Robson.

C. The Ruling That Equal Protection And Due Process Rights Are Not Within 28 USC 1343(3) Is In Conflict With This Court's Decisions.

The Illinois special injury rule which excluded 99 percent or more of its taxpayers from access to the Illinois courts is in direct conflict with the 14th Amendment principles long upheld by this Court. No bar exists to the claim of jurisdiction under 1343(3) because a jurisdictional claim, firmly as this grounded upon due process and equal protection clauses, also seeks to safeguard and protect public property rights.

In *Cipriano* v. *Houma*, 395 U.S. 701, 702 ff, non-property owners were prohibited by Louisiana law from voting on $10 million of municipally owned revenue bond issue. This Court considered as significant the economic interest of

non-property owners in the municipal plant. It set aside the statute as in violation of the equal protection clause. No issue of aggregation of claims was considered. *Cipriano* was an exclusively local contest involving the right to vote to protect a public economic interest.

Here, however, plaintiff's class of 1,000,000 were denied access to the Illinois courts under an unconstitutional Illinois law. We, as the Cipriano citizens, were entitled to a remedy in the federal courts under 28 USC 1343(3). The Court of Appeals in disregarding this Court's decisions during the past 20 years committed such a grave error as to require review by this Court to safeguard our personal rights of due process and equal protection.

Ream v. *Handley*, 359 F.2d 728, 731, relied upon in the Court's opinion, holds 1343 does not apply "where a person seeks only to protect property or monetary rights." It was improperly expanded, and without precedent, to include personal due process and equal protection claims.

A second reason for review of the issue of property versus personal rights arising since *Hague* v. *CIO*, 307 U.S. 496, 508 ff, is the concern of other federal courts illustrated by decisions in the Second and Fifth Circuits.

In *Gold* v. *Lomenzo*, 425 F.2d 959 (1970) (C.A. 2) Judge Friendly wrote the majority view sustaining jurisdiction under 1343(3) in a case where the plaintiff sought to enjoin the enforcement of a New York City officer suspending his real estate license. Judge Hayes dissented.

In *Johnson* v. *Harder*, 438 F.2d 7, 9 (1971), the Court said:

> "In spite of the attempt of this Court in Eisen to clarify the scope of section 1343(3), the question continues to create difficulties."

And in *Eisen* v. *Eastman,* 421 F.2d 509, 563 (1969), Judge Friendly in an exhaustive review of the personal issues stated:

> "There has been no thorough discussion by the Supreme Court of the scope of 28 USC 1343(3) since Hague v. CIO, 307 U.S. 496 (1939). Apart from its age, Hague casts an uncertain light because of the absence of a majority opinion."

The 5th Circuit has in several cases upheld federal jurisdiction under both 28 USC 1343(3) and 1331, though clearly only property interests were involved or were certainly predominant. *Hornsby* v. *Allen,* 326 F.2d 605 (1964), denial of city liquor license; *Mansell* v. *Saunders,* 372 F.2d 573 (1967) garbage district license denied. See also *McGuire* v. *Sandler,* 337 F.2d 902 (1964). In *Busse* v. *Long,* 383 F.2d 766, 770 (1967), the Court refused to entertain jurisdiction in a case involving a claim assessment of property violated the 14th Amendment. It declined because it believed plaintiff found an adequate remedy was available under Louisiana law. In *Lemont,* Plaintiff's class had no remedy under Illinois law.

The Court of Appeals' conclusion on this highly significant issue of constitutional law will impair the preservation of vital constitutional rights. Review of this decision by this Court is required.

III.

THE INTERVENING CHANGE IN THE ILLINOIS SPECIAL INJURY LAW REQUIRED REVERSAL.

In September, 1970, the Illinois Supreme Court in *Paepcke*[1] finally repudiated the special injury rule including

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[1] *Paepcke* v. *P. B. C. et al.,* 46 N.E. 2d 330, 341, 267 N.E. 2d 11, 18 (App. 36).

its application in the *Droste* v. *Kerner* case (App. 36). Nevertheless, the Court of Appeals failed to either consider or give effect to the decisions of this Court that such a change of law compelled it to reverse and vacate the judgment below. The change in the law rendered at best the case only partially moot and the Court was bound to direct the District Court to enter such orders as will assure justice. Petitioner had filed an Emergency Motion on November 9, 1970, praying that the District Court judgment be reversed, that the case be remanded to assure prompt trial on the merits or such other orders as would advance the interests of justice in this case. *Duke Power Co.* v. *Greenwood,* 229 U.S. 259, 267, 268; *U. S.* v. *Munsingwear,* 340 U.S. 36, 39, 40.

In his Emergency Motion Petitioner argued that the *Paepcke* Opinion did not grant plaintiff's class any of the relief that they sought, the controversy over the validity of defendants leases had not been adjudicated, defendants had not tendered to plaintiff's class any of the relief they sought, there had been no state court action between the parties for nearly four years, and the action could not be maintained in the state courts for the state court judgment affirmed by the Appellate Court had found such suit to be multifarious. Moreover the controversies between plaintiff and his class were a continuing one in that defendants intended for the next nearly 90 years or longer to continue in their unlawful retention of the District leases and to deprive plaintiff's class as equitable owners of the property of their equitable interest therein.

Among the decisions supporting the plaintiff's motion was *Butler* v. *Eaton,* 141 U.S. 240, 242, 243, holding that an intervening state judgment in another related case required reversal of the judgment below. In *Blackman et al.* v. *Stone,* 300 U.S. 641, reversing 17 F. Supp. 102, the Court remanded for possible District Court action with respect

to remaining orders; and the right to amend following a change in state law was granted in *Bryan et al.* v. *Austin*, 254 U.S. 933.

Paepcke should be construed as confirming plaintiff's claims the special injury rule was arbitrary and unconstitutional. It did not however, terminate or decide his claim for relief, declare defendant's leases were illegal, require that they be reformed to include periodic redetermination of values and rentals or restore, in part, at least some of the enormous irreparable loss suffered by the public as a result of the terms of the leases.

Instead of recognizing the right of Plaintiff's class to benefits of the *Paepcke* decision under well established federal principles, the Court of Appeals inflicted a disastrous, unwarranted and unjust defeat upon them.

The absence of a pending state court action involving these defendants was the responsibility of the Defendants.

Under *United Mine Wkrs.* v. *Gibbs*, 383 U.S. 715, 726 the District Court should try this case for its justification "lies in considerations of judicial economy convenience and fairness to litigants."

This is true though a new state action[1] involving other lessees was recently filed in the state courts. Petitioner believes they, too, will produce technical delaying motions. Some of their pleadings are due before the date of respondent's briefs. Petition will refer to them in his reply.

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[1] See also *Watts* v. *Seward School Bd.*, 381 U.S. 126 and *Case* v. *Nebraska*, 381 U.S. 126 and *ICRR* v. *Olberding*, 346 U.S. 338, 214 F. 2d 91, 92-95 (CA 7) (1954).

[1] *Gendel et al.* v. *North American Car Corp. et al.*, Circuit Court of Cook County, 71 Ch. 2770. On August 17, 1971, Petitioner as one of counsel for plaintiffs, received a Motion to Dismiss from Defendant Freeport Sulphur Company on the claim of statute of limitations. It has an 8.57 acre lease running from 1960 to 2010 and currently pays annual rental of $1200. Its lease calls for annual rentals of $1200 for the first 20 years and revaluations later subject to increases of no more than 20%.

Defendants have gained a seven-year delay by their questionable conduct which at all stages comes under the category of unclean hands. The judgment below should be reversed and with directions that the case be sent back to the District Court for prompt trial and disposition before Judge Hubert L. Will. Only by combined federal and state court action in their separate cases can the public be assured of reasonable relief.

IV.

THE RULING PETITIONER WAS ESTOPPED FROM PRESENTING CONSTITUTIONAL ISSUES IS IN CONFLICT WITH THIS COURT'S CONTROLLING PRINCIPLES.

The Court of Appeals after assuming that federal jurisdiction might vest under plaintiffs equal protection claims held he was estopped from asserting such constitutional rights solely upon the authority of *Angel* v. *Bullington*, 330 U.S. 183, 189, 190. Plaintiff, the opinion said, failed to take his case to the Illinois Supreme Court and then if necessary to this Court. (440 F. 2d at p. 388).

No consideration was given to this Court's limited and conflicting application of *Angel*, the equitable nature of the estoppel doctrine, the controlling abstention principle or the cold realities contrasted with the hypothetical theories advanced in the opinion.

Looking first at realities, Judge Kerner overlooked that, while plaintiff's case was pending in the Appellate Court, he had successfully placed the weight of his office as Governor in favor of the rule accepted by the Illinois Supreme Court that Illinois taxpayers such as plaintiffs lacked standing to sue. Furthermore, his Attorney General, and U. S. Steel had also then successfully argued in this Court it should reject *Droste* appeal, for the special injury rule created no federal issues.

The utter hopelessness of the task suggested by Judge Kerner did not occur to him but it did to plaintiff who properly recognized that relief to the District taxpayers, if any, would come only in the federal courts.

The *Angel* opinion states its limited applicability to diversity cases and its inapplicability to federal and constitutional issues. (330 U.S. at p. 190). This view was confirmed by this Court, *First Nat. Bank* v. *United Air Lines,* 342 U.S. 396, 397 and other decisions.

There is no justification in the Court's opinion or otherwise for its refusal to consider or give effect to such well established and controlling principles. This Petition should therefore be allowed.

Estoppel is both an equitable and due process doctrine as was recently reaffirmed in *Blonder* v. *Univ. Foundation,* 28 L. Ed. 2d 788, 800 (1970), when the Court said "the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." No such opportunity was afforded to the 1,000,000 taxpayers in plaintiff's class and the Court of Appeals should not have accepted defendants' version of it.

The abstention doctrine is fundamental to the issue of federal versus state Court jurisdiction over federal constitutional issues. It is illustrated by *England* v. *Medical Examiners,* 375 U.S. 411, and *Zwickler* v. *Koota,* 389 U.S. 241. This doctrine though recognizing an element of discretion in the federal courts, must be applied consistently with the principle that Congress has imposed an absolute duty upon the federal Courts to decide federal constitutional disputes. Plaintiff's class were not deprived of their right to federal judicial determination of their constitutional claims because they litigated state issues in the state courts. The *England* decision supports this principle.

The continuing commitment of this Court to abstention is revealed in *Askew et al.* v. *Hargrove, et al.*, 28 L. Ed 196, 197, (1971). After a state suit was filed subsequent to the federal action, this Court applying abstention declared that federal action should be stayed for the state action "if sustained will obviate the necessity of determining the 14th Amendment questions." See also, *Wisconsin* v. *Constantineau*, 27 L. Ed. 2d 515.

In *Zwickler*, this Court declared the obligation of the federal courts at all levels to hear and decide constitutional claims requires them to "give due respect to a suitor's choice of a federal forum for the hearing and decision of its federal constitutional claims." (p. 248).

Here "resolution of the federal constitutional question is (not) dependent upon, or may be materially altered by, the determination of an uncertain issue of state law," *Harman* v. *Forsenius*, 380 U.S. 528, 534.

V.

THE NATURE OF THE PUBLIC INTEREST IN PUBLIC PROPERTY CONVERTED INTO PRIVATE PROPERTY SHOULD BE CONSIDERED BY THIS COURT.

The present suit is directed in part to recovery property from private corporations who by conduct tantamount to fraud have acquired it and converted it into their private property. Since *Crampton* v. *Zabriski*, 101 U.S. 601, 609 (1879), this Court has upheld taxpayers' interest in public monies to be direct and immediate with power to enjoin its misuse. Judge Will, 264 F. Supp. 467, 468 (1967), recognized the taxpayers equitable interest in public property held by General Dynamics as justifying standing under the due process clause.

The legal significance of public property held in trust is stated in the numerous decisions during the past 100

years in state and federal courts, in the laws enacted by states and in state constitutions. The nature of the responsibility of public officials holding property in trust for the public has been held to be similar to the duties of trustees for property privately owned. *Heilig Bros.* v. *Kohler*, 76 Atl.2d 613, 616, 617 (Sup.Ct.Pa., 1950). The highest standards of conduct have been imposed upon public trustees to assure the maximum possible return to taxpayers and the public as beneficiaries of public property held in trust. *Lassen* v. *Arizona*, 385 U.S. 458, 468, 469; (See also App. 69-72).

In *Herr* v. *Rudolph*, 25 NW 2d 916, 921, the North Dakota Supreme Court prohibited a public trustee from selling public property at private sale as taxpayers were deprived of the possibility of a greater income through competitive bidding. This claim was asserted a state statute exempting certain bidders from the requirements of a competitive bidding law violated the equal protection clause. See also, Raoul Berger, "Standing to Sue in Public Actions: Is It a Constitutional Requirement?" (Yale Law Jour. Vol. 78:5:Apr. 1969, 816-840).

The Court of Appeals' opinion holds upon the basis of *Owensboro* (200 U.S. 38), that federal courts have been reluctant "to interfere with the administration of municipal affairs." (440 F.2d p. 387, App. 3). He was in error in that: first, this Court has been consistently interfering with municipal and state action where, as here, federal issues are at stake. Second, this litigation was directed against the private corporations who by actions tantamount to fraud had acquired public property and converted it into private property. Thirdly, the District joined plaintiff in requesting the District Court to try this case.

Plaintiff's class possessed property interests within Amendment XIV.

VI.

PETITIONER'S CLAIM WAS FOUNDED ON A TRADITIONAL JOINT AND COMMON CLAIM.

Plaintiff's suit was directed against the recovery of equitable interests in property held by private corporations. It was a traditional joint and common claim. *Snyder* v. *Harris*, 394 U.S. 332. Judge Will's opinions so concluded: "The right asserted by plaintiff held in common by all members of his class." (264 F. Supp. 370. See also *Dierks* v. *Thompson*, 414 F.2d at p. 456). This Court of Appeals did not reach this issue (440 F.2d at. p. 388).

That such claims are true class actions (under the new Rule 23) was stated by Professor Charles A. Wright in his discussion of class actions, 47 FRD 169, 174, when he said:

> "Another familiar class suit is that in which one or more taxpayers of a community, suing on behalf of all, challenge the validity of a proposed public expenditure. It is difficult to believe that there has ever been such a case in which a good many of the taxpayers would not have preferred that their rights not be enforced, because of their interest in having the expenditure made. Yet no one has ever doubted the propriety of bringing such a suit as a class action."

Petitioner prays that this Court order the Court of Appeals to direct the District to set aside its ruling on this issue.

VII.

IMPORTANCE OF THE CASE.

This litigation is but another chapter in the public's battle to assure the protection of their interests in the constantly diminishing national, state and local land resources.[1]

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[1] This suit was instituted under the theory "to tell them (taxpayers) they must wait upon government action is often an effectual denial of the right for all time." This language was incorporated in 1970 in the opinion of the Illinois Supreme Court in *Paepcke et al* v. *P. B. C. et al.*, 263 NE2d 11, 18. (App. 36).

Here, the land at issue serves far greater national purposes than local for the majority of the corporate lessees acquired their long term interests because of its invaluable uses for interstate industrial commercial and transportation purposes.

In 1970 an exhaustive study of the nation's land resources was submitted to the President and Congress by the Public Land Law Review Commission, "One Third of the Nation's Land", in which it was stated in part:

> "While there may be some modest disposals, we conclude that at this time most public land would not serve the maximum public interest in private ownership." (p. 1)
>
> "Every landowner is concerned with the return that he receives for the use of his land or for the revenue he receives from the products produced on that land. United States citizens, collectively the owners of the public lands, are similarly concerned." (p. 3)

The 1970 Illinois 76th General Assembly Report of the Ill. State Senate Local Gov. Services Subcom. of the Mun. Corp. Comm. on this subject (Vol. II, Facts—Summary and Evaluation, "The Met. San. Dist. of Greater Chicago", (at p. 63 said in part):

> "Unfortunately the taxpayers of the Sanitary District had already suffered irreparable damage before these reforms were made, because most of the desirable land of the District was already under lease, and therefore only a few leases have been granted since that time." (App. 68)

The *Lemont* case has national significance beyond the constitutional and federal issues of due process, equal protection, personal rights, equitable estoppel, partial mootness, and the issue of Judge Kerner's disqualification. These additional factors include:

First, Petitioner seeks to determine proper standards and conditions primarily for future compensation and use

extending to 2050 or later for the invaluable public property. These standards embody periodic redetermination of rentals based upon changing market values. Ordinarily this is a legislative or administrative function but Article I, Sec. 10 prohibits retroactive legislative action.

Second, the occupation under lease or otherwise of vast areas of industrial and commercial use public land is not limited to Chicago; it covers metropolitan areas adjoining navigable waterways or otherwise, throughout the country.

Petitioner does not suggest the questionable circumstances here permeate all other areas. However, this is often a gray if not a dark area and the time is overdue to shed more light upon it. They too may benefit, if this Writ is allowed.

Third, the national interest is important, as has already been indicated. Large amounts of federal money has and will continue to be used to improve it.

Fourth, the state refused to assume its responsibility for the litigation for this case, and it is now properly within the jurisdiction of the federal courts who are uniquely qualified to deal with complex litigation such as this.

This Court as the ultimate guardian of the nation's constitutional rights has another opportunity to perform that function and to again serve the interest of the people of Illinois and the nation.

CONCLUSION

Petitioner prays that this Honorable Court grant this petition and enter a judgment reversing the final decree of the Court of Appeals with instructions that it direct the District Court set aside its judgment and set this cause for early trial.

Respectfully submitted,

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ANdover 3-6475
Petitioner, Pro Se

EXHIBIT 1

STATUTES

1254. COURTS OF APPEALS; CERTIORARI: APPEAL: CERTIFIED QUESTIONS

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . .

1331. FEDERAL QUESTION: AMOUNT IN CONTROVERSY: COSTS.

(a) The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

1343. CIVIL RIGHTS AND ELECTIVE FRANCHISE

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.